

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

## CONSENT DECREE

V.

Defendant.

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## I. INTRODUCTION

A. In entering into this Consent Decree (Decree), the mutual objective of the Washington State Department of Ecology (the Department) and of Avista Development, Inc. (the Respondent) is to provide for remedial action at a location where there has been a release of hazardous substances. This Decree requires the Respondent to undertake the remedial actions specified in the Cleanup Action Plan attached as Exhibit A to this Decree. The Department has determined that the actions described in the Cleanup Action Plan are necessary to protect public health and the environment.

B. The Respondent and the Department have also entered into a consent decree with several Debtors (defined below) in the U.S. Bankruptcy Court matter styled, *In re Kaiser Aluminum Corporation, et al.*, Bankr. D. Del, Case No. 02-10429 (JFK) (the Bankruptcy Consent Decree). Under the Bankruptcy Consent Decree, the Debtors agree to contribute to the funding of the remedial action called for by this Decree, in exchange for certain releases, covenants not to sue, and other consideration from Avista and the Department as more fully described in the Bankruptcy Consent Decree. The Parties to this Decree acknowledge that the United States Environmental Protection Agency (USEPA) under the authority of CERCLA

1 (i.e. Superfund) is investigating hazardous substance contamination in the Coeur d' Alene  
2 basin and the upper Spokane River, focusing on metals contamination associated with historic  
3 mining operations in Idaho. USEPA has designated the Spokane River as part of Operable  
4 Unit 3 in its Record of Decision (ROD). Remedy selection and evaluation in Washington  
5 addressed by the USEPA in the ROD encompasses the river from the Idaho state line  
6 downstream to Upriver Dam, including the entire Upriver Dam PCB Sediment Site. Metals-  
7 related contamination associated with historic mining operations has been determined to be  
8 broadly distributed within Operable Unit 3, including areas at the Site. The USEPA ROD  
9 (September 2002) proposed capping or dredging as remedy alternatives to reduce metals risks  
10 in sediments immediately behind Upriver Dam. The USEPA also concluded that further  
11 investigation and coordination with the State of Washington is appropriate before selection of  
12 the final remedy for metals contamination.

13 C. USEPA was provided with a draft of the Cleanup Action Plan and of this  
14 Decree, and given an opportunity to comment on both documents. The Parties agree that the  
15 remedial actions required by this Decree are consistent with the remedy alternatives that  
16 USEPA has proposed for metals-related contamination in sediments behind Upriver Dam.

17 D. A complaint in this action was filed on January 17, 2003. An earlier Consent  
18 Decree was entered by this Court on February 6, 2003, and required Avista and Kaiser  
19 Aluminum and Chemical Corporation to perform certain studies and investigations, which  
20 have now been completed. An answer has not been filed, and there has not been a trial on any  
21 issue of fact or law in this case. However, the Parties wish to resolve the issues raised by the  
22 Department's complaint. In addition, the Parties agree that settlement of these matters without  
23 litigation is reasonable and in the public interest and that entry of this Decree is the most  
24 appropriate means of resolving these matters.

25 E. In signing this Decree, Avista agrees to its entry and agrees to be bound by its  
26 terms.

1 F. By entering into this Decree, the Parties do not intend to discharge non-settling  
2 parties from any liability they may have with respect to matters alleged in the complaint other  
3 than as provided in the Bankruptcy Consent Decree. The Parties retain the right to seek  
4 reimbursement, in whole or in part, from any liable persons (except as provided in the  
5 Bankruptcy Consent Decree) for sums expended under this Decree.

6 G. This Decree shall not be construed as proof of liability or responsibility for any  
7 releases of hazardous substances or cost for remedial action nor an admission of any facts;  
8 provided, however, that the Respondent shall not challenge the authority of the Attorney  
9 General and the Department to enforce this Decree.

10 H. The Court is fully advised of the reasons for entry of this Decree, and good  
11 cause having been shown: Now, therefore, it is HEREBY ORDERED, ADJUDGED, AND  
12 DECREED:

## 13 II. JURISDICTION

14 A. This Court has jurisdiction over the subject matter and over the Parties pursuant  
15 to Chapter 70.105D RCW, the Model Toxics Control Act (MTCA). Authority is conferred  
16 upon the Washington State Attorney General by RCW 70.105D.040(4)(a) to agree to a  
17 settlement with any potentially liable person if, after public notice and any required hearing,  
18 Ecology finds the proposed settlement would lead to a more expeditious cleanup of hazardous  
19 substances. RCW 70.105D.040(4)(b) requires that such a settlement be entered as a Consent  
20 Decree issued by a court of competent jurisdiction.

21 B. The Department has determined that a release or threatened release of hazardous  
22 substances has occurred at the Site that is the subject of this Decree.

23 C. The Department has given notice to the Respondent, as set forth in RCW  
24 70.105D.020(15), of the Department's determination that the Respondent is a potentially liable  
25 person for the Site and that there has been a release or threatened release of hazardous  
26 substances at the Site.

1 D. The actions to be taken pursuant to this Decree are necessary to protect public  
2 health and the environment.

3 E. This Decree has been subject to public notice and comment.

4 F. Ecology finds that this Decree will lead to a more expeditious cleanup of  
5 hazardous substances at the Site in compliance with the cleanup standards established under  
6 RCW 70.105D.030(2)(e) and Chapter 173-340 WAC.

7 G. The Respondent has agreed to undertake the actions specified in this Decree and  
8 consents to the entry of this Decree under MTCA.

### 9 **III. PARTIES BOUND**

10 This Decree shall apply to and be binding upon the Parties, their successors and  
11 assigns. The undersigned representative of each Party hereby certifies that he or she is fully  
12 authorized to enter into this Decree and to execute and legally bind such party to comply with  
13 the Decree. The Respondent agrees to undertake all actions required by the terms and  
14 conditions of this Decree. No change in ownership or corporate status shall alter the  
15 responsibility of the Respondent under this Decree. Respondent shall provide a copy of this  
16 Decree to all agents, contractors, and subcontractors retained to perform work required by this  
17 Decree, and shall ensure that all work undertaken by such agents, contractors, and  
18 subcontractors complies with this Decree.

### 19 **IV. DEFINITIONS**

20 Unless otherwise specified, the definitions set forth in Chapter 70.105D RCW and  
21 Chapter 173-340 WAC shall control the meanings of the terms used in this Decree.

22 A. Site: The Site consists of the areal extent of PCB-contaminated sediments in  
23 that area of the Spokane River located upstream of and hydraulically influenced by the Upriver  
24 Dam between approximate river mile (RM) 80 (near the Upriver dam) and RM 85 (upstream of  
25 the dam near the Centennial Trail footbridge). The Site is more particularly described in  
26

1 Exhibit B to this Decree, which is a detailed site diagram. The Site constitutes a “facility”  
2 under RCW 70.105D.020(4).

3 B. Parties: Refers to the Washington State Department of Ecology (the  
4 Department) and the Respondent, collectively.

5 C. Respondent: Refers to Avista Development, Inc.

6 D. Consent Decree or Decree: Refers to this Consent Decree and each of the  
7 exhibits to the Decree. All exhibits are integral and enforceable parts of this Consent Decree.  
8 The terms “Consent Decree” or “Decree” shall include all Exhibits to the Consent Decree.

9 E. Day or Days: Refers to a calendar day(s) unless otherwise specified. In  
10 computing any period of time under this Decree, if the last day falls on a Saturday, Sunday, or  
11 a state or federal holiday, the period shall run until the end of the next day which is not a  
12 Saturday, Sunday, or a state or federal holiday. Any time period scheduled to begin on the  
13 occurrence of an act or event shall begin on the day after the act or event.

14 F. Section: Refers to a portion of this Consent Decree identified by a Roman  
15 numeral.

16 G. Debtors: Refers to the several debtors in the bankruptcy case styled *In re*  
17 *Kaiser Aluminum Corporation, et al.*, Bankr. D. Del., Case No, 02-10429 (JKF), including  
18 Kaiser Aluminum & Chemical Corporation (Kaiser), owner and operator of the Kaiser  
19 Trentwood Works in Spokane, Washington. The Debtors are not Parties to this Consent  
20 Decree.

## 21 V. STATEMENT OF FACTS

22 The Department makes the following findings of fact without any express or implied  
23 admissions by the Respondent.

24 1. Avista Development, Inc. (Avista) (a subsidiary of Avista Corporation, formerly  
25 Washington Water Power Company) is successor to Pentzer Development Corporation  
26

1 (Pentzer). Pentzer is the past owner and operator of the Spokane Industrial Park, which is  
2 located on the Spokane River at approximately RM 87.

3 2. Avista's predecessor Pentzer discharged industrial effluent wastewater to the  
4 Spokane River in Washington prior to 1994, under the provisions of the State of Washington  
5 Water Pollution Control Law and the federal Water Pollution Control Act, or predecessor laws.

6 3. Polychlorinated biphenyls, or PCBs, have been found in fish, sediment, and  
7 water of the upper Spokane River, upstream of RM 80, which approximately marks the  
8 location of Upriver Dam. PCBs have been documented in effluent waters and solids associated  
9 with Spokane Industrial Park.

10 4. In certified correspondences dated June 1, 2001, the Department notified Avista,  
11 Kaiser, and Liberty Lake Sewer District of a preliminary finding of potential liability for PCBs  
12 in sediments behind Upriver Dam and requested comment on those findings. In subsequent  
13 certified correspondence, the Department notified Inland Empire Paper Company of a  
14 preliminary finding of potential liability for PCBs in sediments behind Upriver Dam and  
15 requested comment on those findings. Liberty Lake Sewer District and Inland Empire Paper  
16 Company have declined to participate in remedial actions at the Site and are not signatories to  
17 this Decree.

18 5. Respondent has designated a project coordinator to implement the Work to be  
19 Performed. By execution of this Decree, the Respondent agrees to be bound by the terms  
20 thereof and not to contest the same.

## 21 **VI. WORK TO BE PERFORMED**

22 This Decree contains a program designed to protect human health and the environment  
23 from the known release, or threatened release, of hazardous substances or contaminants at, on,  
24 or from the Site.

25 1. The Respondent shall furnish all personnel, materials and services necessary  
26 for, or incidental to, the planning, initiation, completion, and reporting upon the Cleanup

1 Action Plan, attached as Exhibit A. The work to be performed is the completion of the  
2 remedial action described in the attached Cleanup Action Plan.

3 2. The Cleanup Action Plan and each element thereof are designed and shall be  
4 implemented and completed in accordance with the Model Toxics Control Act (Chapter  
5 70.105D RCW) and its implementing regulation (Chapter 173-340 WAC) as amended, and all  
6 applicable federal, state, and local laws and regulations.

7 3. As provided in the agreed upon schedule, attached as Exhibit C, the Respondent  
8 shall commence work and thereafter complete all tasks in Exhibit A in the time frames and  
9 framework indicated unless the Department grants an extension in accordance with Section  
10 XV.

11 4. The Respondent agrees not to perform any remedial actions at the Site that are  
12 outside the scope of this Decree unless the Parties agree to amend the Cleanup Action Plan to  
13 cover these actions. All work conducted by the Respondent under this Decree shall be done in  
14 accordance with Chapter 173-340 WAC unless otherwise provided herein.

## 15 **VII. DESIGNATED PROJECT COORDINATORS**

16 The project coordinator for the Department is:

17 David Sternberg  
18 Department of Ecology  
19 Eastern Regional Office  
20 4601 N. Monroe  
Spokane, WA 99205-1295

21 The project coordinator for the Respondent is:

22 Douglas K. Pottratz  
23 Avista Corporation  
24 PO Box 3727  
Spokane, WA 99220-3727

25 Each project coordinator shall be responsible for overseeing the implementation of this  
26 Decree. The Department project coordinator will be the Department's designated  
representative at the Site. To the maximum extent possible, communications between the



1 Department and the Respondent and all documents, including reports, approvals, and other  
2 correspondence concerning the activities performed pursuant to the terms and conditions of  
3 this Decree, shall be directed through the project coordinators. The project coordinators may  
4 designate, in writing, working level staff contacts for all or portions of the implementation of  
5 the remedial work required by this Decree. The project coordinators may agree to minor  
6 modifications to the work to be performed without formal amendments to this Decree. Minor  
7 modifications will be documented in writing by the Department. Substantial changes shall  
8 require amendment of this Decree.

9 Any Party may change its respective project coordinator. Written notification shall be  
10 given to the other Party at least ten (10) calendar days prior to the change.

#### 11 **VIII. PERFORMANCE**

12 All work performed pursuant to this Decree shall be under the direction and  
13 supervision, as necessary, of a licensed professional engineer or licensed hydrogeologist, or  
14 equivalent, with experience and expertise in hazardous waste site investigation and cleanup.  
15 The Respondent shall notify the Department in writing of the identity of such engineer(s) or  
16 hydrogeologist(s), or others and of any contractors and subcontractors to be used in carrying  
17 out the terms of this Decree, in advance of their involvement at the Site. Any construction  
18 work performed pursuant to this Decree shall be under the supervision of a professional  
19 engineer or a qualified technician under the direct supervision of a professional engineer. The  
20 professional engineer must be registered in the State of Washington, except as provided in  
21 RCW 18.43.130.

#### 22 **IX. ACCESS**

23 The Department or any Department-authorized representative shall have the authority  
24 to enter and freely move about portions of the Site over which the Respondent has control and  
25 all associated field investigation operations at all reasonable times for the purposes of, inter  
26 alia: inspecting records, operation logs, and contracts related to the work being performed

1 pursuant to this Decree; reviewing the progress in carrying out the terms of this Decree;  
2 conducting such tests or collecting samples as the Department may deem necessary; using a  
3 camera, sound recording, or other documentary type equipment to record work done pursuant  
4 to this Decree; and verifying the data submitted to the Department by the Respondent. By  
5 signing this Decree, the Respondent agrees that this Decree constitutes reasonable notice of  
6 access, and agree to allow access to site-related field operations at all reasonable times for  
7 purposes of overseeing work performed under this Decree. Without limitation on the  
8 Department's rights under this Section IX, the Department agrees to endeavor to notify  
9 Respondent at least 2 days in advance of intended access.

10 The Department and the Respondent acknowledge that Avista does not own any of the  
11 properties that compose the Site. The Respondent will use reasonable efforts to obtain access  
12 to the Site. If necessary, the Department will exercise its authority under Chapter 70.105D  
13 RCW to ensure access to the Site or to facilitate remedial action at the Site.

#### 14 **X. SAMPLING, DATA REPORTING, AND AVAILABILITY**

15 With respect to the implementation of this Decree, the Respondent shall make the  
16 results of all sampling, laboratory reports, and/or test results generated by it, or on its behalf  
17 available to the Department and shall submit these results in accordance with Section XI of this  
18 Decree.

19 In accordance with WAC 173-340-840(5), sampling data shall be submitted according  
20 to the Department's sampling data submittal requirements as set forth in Exhibit D to this  
21 Decree. In addition, in accordance with the Department's Sediment Quality Information  
22 System software (SEDQUAL) needs, sediment or bioassay sampling data shall be submitted to  
23 Ecology in a electronic format compatible for entry into the SEDQUAL database using the  
24 system's *data entry templates*.

25 If requested by the Department, the Respondent shall allow split or duplicate samples to  
26 be taken by the Department and/or its authorized representatives of any samples collected by

1 Respondent pursuant to the implementation of this Decree. Respondent shall notify the  
2 Department seven (7) working days in advance of any planned field sample collection or work  
3 activity at the Site. The Department shall, upon request, allow split or duplicate samples to be  
4 taken by Respondent or its authorized representatives of any samples collected by the  
5 Department pursuant to the implementation of this Decree provided it does not interfere with  
6 the Department's sampling. Without limitation on the Department's rights under Section IX,  
7 the Department shall endeavor to notify Respondent at least seven (7) days prior to any  
8 scheduled sample collection activity. This will not apply to emergencies or time-critical  
9 actions.

10 In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be  
11 conducted by a laboratory accredited under Chapter 173-350 for the specific analyses to be  
12 conducted, unless otherwise approved by Ecology.

#### 13 **XI. PROGRESS REPORTS**

14 Respondent shall submit to the Department written progress reports as provided in the  
15 Cleanup Action Plan, Exhibit A to this Decree.

#### 16 **XII. RETENTION OF RECORDS**

17 Respondent shall preserve, during the pendency of this Decree and for ten (10) years  
18 from the date this Decree is no longer in effect as provided in Section XXVI, all records,  
19 reports, documents, and underlying data in its possession relevant to the implementation of this  
20 Decree and shall insert in contracts with project contractors and subcontractors a similar record  
21 retention requirement. Upon request of the Department, Respondent shall make all non-  
22 archived records available to the Department and allow access for review. All archived records  
23 shall be made available to the Department within a reasonable period of time.

### **XIII. RESOLUTION OF DISPUTES**

In the event a dispute arises as to an approval, disapproval, proposed modification or other decision or action by the Department or the Department's project coordinator, the Parties shall utilize the dispute resolution procedure set forth below.

A. Upon receipt of the Department's or Department project coordinator's decision, or upon notice of the Department's or Department project coordinator's action, the Respondent has fourteen (14) days within which to notify the Department's project coordinator of its objection to the decision or action.

(1) The Parties' project coordinators shall then confer in an effort to resolve the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days, the Department's project coordinator shall issue a written decision.

(2) Respondent may then request regional management review of the decision. This request shall be submitted in writing to the Eastern Region Toxics Cleanup Program Section Manager within seven (7) days of receipt of the Department's project coordinator's decision.

(3) Ecology's Regional Section Manager shall conduct a review of the dispute and shall issue a written decision regarding the dispute within thirty (30) days of the Respondent's request for review.

(4) If the Respondent finds Ecology's Regional Section Manager's decision unacceptable, the Respondent may request final management review of the decision. This request shall be submitted in writing to the Toxics Cleanup Program Manager within seven (7) days of receipt of the Regional Manager's decision.

(5) The Department's Program Manager shall conduct a review of the dispute and shall issue a written decision regarding the dispute within thirty (30) days of the Respondent's request for review. The Program Manager's decision shall be the Department's final decision on the disputed matter.

1           B.     If the Department's final written decision is unacceptable to the Respondent, it  
2 has the right to submit the dispute to this Court (the Court) for resolution. The Parties agree  
3 that one judge should retain jurisdiction over this case and shall, as necessary, resolve any  
4 dispute arising under this Decree. In the event the Respondent presents an issue to the Court  
5 for review, the Court shall review any investigative or remedial action or decision of the  
6 Department on the basis of whether such action or decision was arbitrary and capricious and  
7 render a decision based on such standard of review.

8           C.     The Parties agree to only utilize the dispute resolution process in good faith and  
9 agree to expedite, to the extent possible, the dispute resolution process whenever it is used.  
10 Where either Party utilizes the dispute resolution process in bad faith or for purposes of delay,  
11 the other Party may seek sanctions.

12           D.     Implementation of these dispute resolution procedures shall not provide a basis  
13 for delay of any activities required in this Decree, unless the Department agrees in writing to a  
14 schedule extension or the Court so orders.

#### 15                   **XIV. AMENDMENT OF CONSENT DECREE**

16           Except for minor modifications agreed to pursuant to Section VII and extensions that  
17 do not constitute a substantial change granted in accordance with Section XV, this Decree may  
18 only be amended by a written stipulation among the parties to this Decree that is entered by the  
19 Court or by order of the Court. All amendments shall become effective upon entry by the  
20 Court. Agreement to amend shall not be unreasonably withheld by any party to the Decree.

21           Any party may propose an amendment to the Decree. A party that receives a request  
22 for amendment shall indicate its approval or disapproval in a timely manner after the request  
23 for amendment is received. If the amendment to the Decree is substantial, the Department will  
24 provide public notice and opportunity for comment. Reasons for the disapproval shall be  
25 stated in writing. If any party does not agree to any proposed amendment, the disagreement  
26

1 may be addressed through the dispute resolution procedures described in Section XIII of this  
2 Decree.

### 3 **XV. EXTENSION OF SCHEDULE**

4 A. An extension of schedule shall be considered when a request for an extension is  
5 submitted in a timely fashion, generally at least 30 days prior to expiration of the deadline for  
6 which the extension is requested, and good cause exists for granting the extension. All  
7 extensions shall be requested in writing. The request shall specify the reason(s) the extension  
8 is needed, the deadline that is sought to be extended, the length of the extension sought, and  
9 any related deadline or schedule that would be affected if the extension were granted.

10 B. An extension shall be granted for such period of time as the Department  
11 determines is reasonable under the circumstances. A requested extension shall not be effective  
12 until approved by the Department or the Court. The Department shall act upon any written  
13 request for extension in a timely fashion. It shall not be necessary to formally amend this  
14 Decree pursuant to Section XIV when a schedule extension is granted unless the extension  
15 constitutes a substantial change.

16 C. The burden shall be on the Respondent to demonstrate to the satisfaction of the  
17 Department that the request for such extension has been submitted in a timely fashion and that  
18 good cause exists for granting the extension. Good cause includes, but is not limited to, the  
19 following:

20 (1) Circumstances beyond the reasonable control and despite the due diligence of  
21 the Respondent including delays caused by unrelated third parties or the Department, such as  
22 (but not limited to) delays by the Department in reviewing, approving, or modifying documents  
23 submitted by the Respondent; or

24 (2) Acts of God or war, including fire, flood, blizzard, extreme temperatures, storm,  
25 earthquake, terrorist attack, or other unavoidable casualty; or

26 (3) Endangerment as described in Section XVI; or

1 (4) Other circumstances agreed to by the Department to be exceptional or  
2 extraordinary.

3 However, neither increased costs of performance of the terms of the Decree nor  
4 changed economic circumstances shall be considered circumstances beyond the reasonable  
5 control of the Respondent.

6 D. An extension shall be granted only for such period as Ecology determines is  
7 reasonable under the circumstances. Ecology may grant schedule extensions exceeding ninety  
8 (90) days only as a result of:

9 (1) Delays in the issuance of a necessary permit which was applied for in a timely  
10 manner; or

11 (2) Other circumstances deemed exceptional or extraordinary by the Department; or

12 (3) Endangerment as described in Section XVI.

13 The Department shall give the Respondent written notification in a timely fashion of  
14 any extensions granted pursuant to this Decree.

#### 15 **XVI. ENDANGERMENT**

16 In the event the Department determines that any activities being performed at the Site  
17 pursuant to this Decree are creating or have the potential to create a danger to human health or  
18 the environment, the Department may order the Respondent to cease such activities for such  
19 period of time as needed to abate the danger or may petition the Court for an order as  
20 appropriate. During any stoppage of work under this section, the obligations of the  
21 Respondent with respect to the work under this Decree which is ordered to be stopped shall be  
22 suspended and the time periods for performance of that work, as well as the time period for any  
23 other work dependent upon the work which is stopped, shall be extended, pursuant to Section  
24 XV of this Decree, for such period of time as the Department determines is reasonable under  
25 the circumstances.  
26

1 In the event the Respondent determines that any activities being performed at the Site  
2 pursuant to this Decree are creating or have the potential to create a danger to human health or  
3 the environment, the Respondent may cease such activities for such period of time necessary  
4 for the Department to evaluate the situation and determine whether the Respondent should  
5 proceed with implementation of the Decree or whether the work stoppage should be continued  
6 until the danger is abated. The Respondent shall notify the Department's project coordinator as  
7 soon as possible, but no later than twenty-four (24) hours after such stoppage of work, and  
8 thereafter provide the Department with documentation of the basis for the work stoppage. If  
9 the Department disagrees with the Respondent's determination, it may order the Respondent to  
10 resume implementation of this Decree. If the Department concurs with the work stoppage, the  
11 Respondent's obligations shall be suspended and the time period for performance of that work,  
12 as well as the time period for any other work dependent upon the work which was stopped,  
13 shall be extended, pursuant to Section XV of this Decree, for such period of time as the  
14 Department determines is reasonable under the circumstances.

## 15 **XVII. COVENANT NOT TO SUE**

16 A. Covenant Not to Sue: In consideration of Respondent's compliance with the  
17 terms and conditions of this Decree, Ecology covenants not to institute legal or administrative  
18 actions against Respondent regarding the release or threatened release of hazardous substances  
19 covered by this Decree.

20 This Decree covers only the Site and those hazardous substances that Ecology knows  
21 are located at the Site as of the date of entry of this Decree. This Decree does not cover any  
22 other hazardous substance or area. Ecology retains all of its authority relative to any substance  
23 or area not covered by this Decree.

24 This Covenant Not to Sue shall have no applicability whatsoever to:

- 25 (1) Criminal liability;
- 26 (2) Liability for damages to natural resources; or



1 (3) Any Ecology action, including cost recovery, against potentially liable persons  
2 not a party to this Decree.

3 If factors not known to Ecology at the time of entry of the settlement agreement are  
4 discovered and present a previously unknown threat to human health or the environment, the  
5 Court shall amend this covenant not to sue.

6 B. Reopeners: Ecology specifically reserves the right to institute legal or  
7 administrative action against Respondent to require it to perform additional remedial actions at  
8 the Site and to pursue appropriate cost recovery, pursuant to RCW 70.105D.050 under the  
9 following circumstances:

10 (1) Upon Respondent's failure to meet the requirements of this Decree, including,  
11 but not limited to, failure of the remedial action to meet the cleanup standards identified in the  
12 Cleanup Action Plan (Exhibit A);

13 (2) Upon Ecology's determination that remedial action beyond the terms of this  
14 Decree is necessary to abate an imminent and substantial endangerment to human health or the  
15 environment;

16 (3) Upon the discovery of factors unknown at the time of entry of this Decree,  
17 including the nature or quantity of hazardous substances at the Site, that present a previously  
18 unknown threat to human health or the environment and Ecology's determination, in light of  
19 these factors, that further remedial action is necessary at the Site to protect human health or the  
20 environment; or

21 (4) Upon Ecology's determination based on factors unknown at the time of entry of  
22 this Decree that additional remedial actions are necessary to achieve cleanup standards within  
23 the reasonable restoration time frame set forth in the Cleanup Action Plan.

24 C. Except in the case of an emergency, prior to instituting legal or administrative  
25 action against the Respondent pursuant to paragraph B. above, Ecology shall provide the  
26 Respondent with fifteen (15) calendar days notice of such action.

1 **XVIII. CONTRIBUTION PROTECTION**

2 With regard to claims for contribution against the Respondent, the Parties agree that the  
3 Respondent is entitled to protection against claims for contribution for matters addressed in this  
4 Decree as provided by RCW 70.105D.040(4)(d). For the purposes of this section, “matters  
5 addressed” include all remedial actions undertaken at the Site pursuant to this Decree.  
6 “Matters addressed” also include all remedial actions previously undertaken at the Site to  
7 characterize the contamination or to enable the selection of a cleanup action, and all oversight  
8 costs paid to Ecology.

9 **XIX. FINANCIAL ASSURANCES**

10 Pursuant to WAC 173-340-440(11), Respondent shall maintain sufficient and adequate  
11 financial assurance mechanisms to cover all costs associated with the operation and  
12 maintenance of the remedial action at the Site, including institutional controls, compliance  
13 monitoring, and corrective measures.

14 Within sixty (60) days of the effective date of this Decree, Respondent shall submit to  
15 Ecology for review and approval an estimate of the costs that it will incur in carrying out the  
16 terms of this Decree, including operation and maintenance and compliance monitoring. Within  
17 sixty (60) days after Ecology approves the aforementioned cost estimate, the Respondent shall  
18 provide proof of financial assurances sufficient to cover all such costs in a form acceptable to  
19 Ecology.

20 Respondent shall adjust the financial assurance coverage and provide Ecology’s project  
21 manager with documentation of the updated financial assurance for:

22 1. Inflation, annually, within thirty (30) days of the anniversary date of the entry of  
23 this Decree; or if applicable, the modified anniversary date established in accordance with the  
24 following subparagraph, or if applicable, ninety (90) days after the close of the Respondent's  
25 fiscal year if the financial test or corporate guarantee is used, and  
26

2. Changes in cost estimates, within thirty (30) days of issuance of Ecology's approval of a modification or revision to the CAP that results in increases to the cost or expected duration of remedial actions. Any adjustments for inflation since the most recent preceding anniversary date shall be made concurrent with adjustments for changes in cost estimates. The issuance of Ecology's approval of a revised or modified CAP will revise the anniversary date established in subparagraph (1) above to become the date of issuance of such revised or modified CAP.

## XX. INDEMNIFICATION

The Respondent agrees to indemnify and save and hold the State of Washington, its employees, and agents harmless from any and all claims or causes of action for death or injuries to persons or for loss or damage to property arising from or on account of acts or omissions of the Respondent, its officers, employees, agents, or contractors in entering into and implementing this Decree. However, the Respondent shall not indemnify the State of Washington nor save nor hold its employees and agents harmless from any claims or causes of action arising out of either the State of Washington's or any of its agencies' status as potentially liable persons with respect to contamination at the Site or the intentional, reckless, or negligent acts or omissions of the State of Washington, or the employees or agents of the State, in implementing the activities pursuant to this Decree.

## XXI. COMPLIANCE WITH APPLICABLE LAWS

A. All actions carried out by the Respondent pursuant to this Decree shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in paragraph B. of this section.

B. Pursuant to RCW 70.105D.090(l), the substantive requirements of chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals for the remedial action under this Decree that are

1 known to be applicable at the time of entry of the Decree are binding and enforceable  
2 requirements of the Decree.

3       The Respondent has a continuing obligation to determine whether additional permits or  
4 approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial  
5 action under this Decree. In the event either the Respondent or the Department determines that  
6 additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be  
7 required for the remedial action under this Decree, it shall promptly notify the other party of  
8 this determination. The Department shall determine whether the Department or the  
9 Respondent shall be responsible to contact the appropriate state and/or local agencies. If the  
10 Department so requires, the Respondent shall promptly consult with the appropriate state  
11 and/or local agencies and provide the Department with written documentation from those  
12 agencies of the substantive requirements those agencies believe are applicable to the remedial  
13 action. The Department shall make the final determination on the additional substantive  
14 requirements that must be met by the Respondent and on how the Respondent must meet those  
15 requirements. The Department shall inform the Respondent in writing of these requirements.  
16 Once established by the Department, the additional requirements shall be enforceable  
17 requirements of this Decree. The Respondent shall not begin or continue the remedial action  
18 potentially subject to the additional requirements until the Department makes its final  
19 determination.

20       The Department shall ensure that notice and opportunity for comment is provided to the  
21 public and appropriate agencies prior to establishing the substantive requirements under this  
22 section.

23       C. Pursuant to RCW 70.105D.090(2), in the event the Department determines that  
24 the exemption from complying with the procedural requirements of the laws referenced in  
25 RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is  
26 necessary for the State to administer any federal law, the exemption shall not apply and the

1 Respondent shall comply with both the procedural and substantive requirements of the laws  
2 referenced in RCW 70.105D.090(l), including any requirements to obtain permits.

### 3 **XXII. REMEDIAL AND INVESTIGATIVE COSTS**

4 The Respondent agrees to pay the remedial action costs incurred by the Department for  
5 the Site pursuant to this Decree that are consistent with WAC 173-340-550, provided that such  
6 costs shall not exceed a total of \$75,000.

7 The Respondent agrees to pay the required amount within ninety (90) days of receiving  
8 from the Department an itemized statement of costs that includes a summary of costs incurred,  
9 an identification of involved staff, and the amount of time spent by involved staff members on  
10 the project. A general statement of work performed will be provided upon request. Itemized  
11 statements shall be prepared quarterly. Pursuant to WAC 173-340-550(4), failure to pay  
12 Ecology's costs within ninety (90) days of receipt of the itemized statement will result in  
13 interest charges at the rate of twelve percent (12%) per annum, compounded monthly.

### 14 **XXIII. IMPLEMENTATION OF REMEDIAL ACTION**

15 If the Department determines that the Respondent has failed without good cause to  
16 implement the remedial action required by this Decree, the Department may, after written  
17 notice to the Respondent and a reasonable opportunity for Respondent to cure the failure,  
18 perform any or all portions of the remedial action required by this Decree that remain  
19 incomplete. If the Department performs all or portions of the remedial action because of the  
20 Respondent's failure to comply with its obligations under this Decree, the Respondent shall  
21 reimburse the Department for the costs of doing such work in accordance with Section XX,  
22 provided that the Respondent is not obligated under this section to reimburse the Department  
23 for costs incurred for work inconsistent with or beyond the scope of this Decree.

### 24 **XXIV. PERIODIC REVIEW**

25 As remedial action, including monitoring, continues at the Site, the Parties agree to  
26 review the progress of remedial action at the Site, and to review the data accumulated as a

1 result of monitoring the Site as often as is necessary and appropriate under the circumstances.  
2 At least every five years after the initiation of cleanup action at the Site, the Parties shall meet  
3 to discuss the status of the Site and the need, if any, for further remedial action at the Site. The  
4 Department reserves the right to require further remedial action at the Site under appropriate  
5 circumstances. With respect to the Respondent, however, the Department may require further  
6 remedial action at the Site only as provided under Section XVII (Covenant Not to Sue). This  
7 provision shall remain in effect for the duration of the Decree. A report, which addresses the  
8 review criteria in WAC 173-340-420, shall be submitted by Respondent ninety (90) days  
9 before every 5-year anniversary of the completion of construction.

## 10 **XXV. PUBLIC PARTICIPATION**

11 The Department shall maintain the responsibility for public participation at the Site. However,  
12 the Respondent shall cooperate with the Department, and shall:

13 A. If agreed to by the Department, prepare drafts of public notices and fact sheets  
14 at important stages of the remedial action, such as the submission of work plans, remedial  
15 investigation/feasibility study reports, cleanup action plans, and engineering design reports. As  
16 appropriate, the Department will edit, finalize, and distribute such fact sheets and prepare and  
17 distribute public notices of the Department's presentations and meetings;

18 B. Notify the Department's project coordinator prior to the preparation of all press  
19 releases and fact sheets, and before major meetings with the interested public and local  
20 governments. Likewise, the Department shall notify the Respondent prior to the issuance of all  
21 press releases and fact sheets, and before major meetings with the interested public and local  
22 governments. The Department shall also endeavor to provide Respondent with an opportunity  
23 to review and comment on all press releases, fact sheets, and other materials that will be  
24 distributed to the public and local governments prior to issuance. For all press releases, fact  
25 sheets, meetings, and other outreach efforts by the Respondent that do not receive prior  
26 Department approval, the Respondent shall clearly indicate to its audience that the press

1 release, fact sheet, meeting, or other outreach effort was not sponsored or endorsed by the  
2 Department;

3 C. Participate in public presentations on the progress of the remedial action at the  
4 Site. Participation may be through attendance at public meetings to assist in answering  
5 questions, or as a presenter;

6 D. In cooperation with the Department, arrange and/or continue information  
7 repositories at the following locations:

8 (1) The Spokane Public Library, Downtown Branch;

9 (2) The Department's Eastern Regional Office at North 4601 Monroe Street in  
10 Spokane.

11 At a minimum, copies of all public notices, fact sheets, and press releases; all quality assured  
12 monitoring data; remedial actions plans and reports, supplemental remedial planning  
13 documents, and all other similar documents relating to performance of the remedial action  
14 required by this Decree shall be promptly placed in these repositories.

#### 15 **XXVI. DURATION OF DECREE**

16 This Decree shall remain in effect until the Respondent has received written  
17 notification from the Department that the requirements of this Decree have been satisfactorily  
18 completed. The Department shall issue such notification within 60 days after the requirements  
19 of this Decree have been satisfactorily completed. Thereafter, the parties within thirty (30)  
20 days shall jointly request that the Court vacate this Consent Decree. After the Decree is  
21 vacated, Section XVII (Covenant Not to Sue) and XVIII (Contribution Protection) shall  
22 survive.

#### 23 **XXVII. CLAIMS AGAINST THE STATE**

24 The Respondent hereby agrees that it will not seek to recover any costs accrued in  
25 implementing the remedial action required by this Decree from the State of Washington or any  
26 of its agencies, except to the extent they are potentially liable persons with respect to

1 contamination at the Site; and further, that the Respondent will make no claim against the State  
2 Toxics Control Account or any Local Toxics Control Account for any costs incurred in  
3 implementing this Decree. Except as provided above, however, the Respondent expressly  
4 reserves its right to seek to recover any costs incurred in implementing this Decree from any  
5 other potentially liable person; however, nothing in this Decree shall affect any claims between  
6 Avista and the Debtors, which shall be governed solely by the Bankruptcy Consent Decree.

#### 7 **XXVIII. EFFECTIVE DATE**

8 This Decree is effective upon the later of (1) the date it is entered by the Court, (2) the  
9 Effective Date of the Bankruptcy Consent Decree, or (3) the date that Debtors make the  
10 payment to the Respondent required by the Bankruptcy Consent Decree.

#### 11 **XXIX. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

12 This Decree has been the subject of public notice and comment under RCW  
13 70.105D.040(4)(a). As a result of this process, the Department has found that this Decree will  
14 lead to a more expeditious cleanup of hazardous substances at the Site in compliance with the  
15 cleanup standards established under Chapter 173-340 WAC.

16 If the Court withholds or withdraws its consent to this Decree, if the Bankruptcy Court  
17 declines to enter the Bankruptcy Consent Decree, or if Debtors fail to make the payment to the  
18 Respondent required by the Bankruptcy Consent Decree, this Decree shall be null and void at  
19 the option of any Party and the accompanying Complaint shall be dismissed without costs and  
20 without prejudice. In such an event, no Party shall be bound by the requirements of this  
21 Decree.



DEPARTMENT OF ECOLOGY

ROB McKENNA  
Attorney General

JIM PENDOWSKI  
Program Manager  
Washington Department of Ecology  
Toxics Cleanup Program

STEVEN J. THIELE, WSBA #20275  
Assistant Attorney General  
Attorneys for Plaintiff  
State of Washington, Department of Ecology

Date: \_\_\_\_\_

Date: \_\_\_\_\_

AVISTA DEVELOPMENT, INC.

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

DATED this \_\_\_\_ day of \_\_\_\_\_, 2005.

JUDGE  
Spokane County Superior Court